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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 18, 19, and 52

[FAR Case 2012-022; Docket 2012-0022; Sequence 1]

RIN: 9000-AM68

Federal Acquisition Regulation; Contracts Under the Small Business Administration 8(a) Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement revisions made by the Small Business Administration (SBA) to its regulations implementing section 8(a) of the Small Business Act, and to provide additional FAR coverage regarding protesting an 8(a) participant's eligibility or size status, procedures for releasing a requirement for non-8(a) procurements, and the ways a participant could exit the 8(a) Business Development program.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication]**

in the **FEDERAL REGISTER**] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2012-022 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-022." Select the link "Comment Now" that corresponds with "FAR Case 2012-022" and follow the instructions provided at the screen. Please include your name, company name (if any), and "FAR Case 2012-022" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2012-022, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202-501-2364, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2012-022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement changes made in the SBA's final rule that was published in the Federal Register at 76 FR 8222 on February 11, 2011, and SBA's subsequent technical amendment that was published in the Federal Register at 77 FR 28237 on May 14, 2012, which made changes to the regulations governing the section 8(a) Business Development program (commonly referred to as the "8(a) Program").

II. Discussion and Analysis

This rule proposes to make a number of changes to regulations governing the 8(a) Program. While many of the changes are editorial and provide minor clarifications, other substantive changes are made, including situations in which an agency may or may not take credit towards its small business goals.

This rule also proposes to include new FAR sections 19.813 to address protesting an 8(a) participant's eligibility or size status, FAR 19.814 to address procedures for requesting a formal size determination, FAR 19.815 to address procedures for releasing a requirement

for non-8(a) procurement, and FAR 19.816 on ways a participant could exit the program.

The following is a summary of the proposed FAR revisions associated with this rule:

A. FAR 5.205, FAR 6.204, and FAR 18.114 proposed revisions include the removal of the term 8(a) concerns, 8(a) contractors, and 8(a) firms, as applicable, and replacing it with 8(a) participants to reflect the accurate terminology used in SBA regulations.

B. FAR 19.000 proposes to remove the term "business development."

C. FAR 19.800 proposed revisions include new language to clarify that the 8(a) Business Development Program, is commonly referred to as the "8(a) program", and that a small business that is accepted into the 8(a) program is known as a "participant". The section further proposes to clarify that an 8(a) contractor is an 8(a) participant that is currently performing on a Federal contract or order that was reserved for 8(a) participants.

D. FAR 19.802 proposes to revise the title of the section from "Selecting concerns for the 8(a) Program," to "Determining eligibility for the 8(a) program", and adds the location in SBA regulations where the eligibility

requirements for participation in the 8(a) program can be found.

E. FAR 19.803 proposed revisions are minor technical clarifications.

F. FAR 19.804 propose the following revisions:

1. Minor revisions to FAR 19.804-1 and 19.804-2
2. Restructuring FAR 19.804-3 to add proposed new paragraph(s) 19.804-3(a)(1), (a)(2), and 19.804-3(c).

(i) FAR 19.804-3(a)(1) proposed revision advises contracting officers that, for acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within 10 working days, the contracting office may seek acceptance through SBA's Associate Administrator for Business Development. The contracting office may assume that SBA has accepted the requirement identified in its offering letter into the 8(a) Program, if a reply from the SBA Associate Administrator for Business Development is not received within five business days of receipt of the contracting agency's request.

(ii) FAR 19.804-3(a)(2) proposed revision advises contracting officers that, for acquisitions not exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within 2 working days, the

contracting officer may assume the offer is accepted and proceed with award of an 8(a) contract.

(iii) FAR 19.804-3(c) proposes to add new language for 8(a) sole source awards. The proposed language advises contracting officers that SBA will either work with the contracting officer to select an 8(a) participant for a possible award, or determine whether an appropriate match exists by matching requirements consistent with the 8(a) participants' capability, where the contracting officer nominates the 8(a) participant.

3. FAR 19.804-4 and 19.804-5 proposed revisions are minor technical clarifications.

4. FAR 19.804-6 proposes to make the following revisions—

(i) Revise FAR paragraph 19.804-6(a) to advise contracting officers that separate offering and acceptance are not required for indefinite delivery contracts that have been set-aside for exclusive 8(a) competition, and also includes minor technical clarifications.

(ii) Includes language concerning an 8(a) contractor's acceptance of new orders after the 8(a) contractor has left the program.

(iii) Clarify that agencies may still continue to take small disadvantaged business (SDB) credit even after

the contractor has left the 8(a) Program, unless the contractor has re-represented that it is other than small.

G. FAR 19.805 proposed revisions include the following:

1. FAR 19.805-1 proposed revisions are minor technical clarifications.

2. FAR 19.805-2(b) proposed revisions include the requirement that an 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the North American Industry Classification System (NAICS) code assigned to the contract and discusses SBA's eligibility determination process.

3. FAR 19.805-2(b)(1) proposed revisions include deleting the text in paragraph (b)(1) and adds a new paragraph (b)(1)(i) and (b)(1)(ii). FAR 19.805-2(b)(1)(i) proposes to clarify that if SBA determines that the apparent successful offeror is ineligible, the contracting office must send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award. FAR 19.805-2(b)(1)(ii) includes language to advise that if the contracting office believes that the apparent successful offeror (or the offeror SBA has determined eligible for award) is not

responsible to perform the contract, the contracting office must refer the matter to SBA for Certificate of Competency consideration.

4. FAR 19.805-2(c) proposed revisions are minor clarifications.

H. FAR 19.808-1 proposed revisions are minor clarifications and adds a new paragraph (d) and (e).

1. FAR 19.808-1(d) proposes to clarify that an 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

2. FAR 19.808-1(e) proposes to implement changes made to SBA's regulations at 13 CFR 124.109(a), 13 CFR 124.109(c)(3)(ii), 13 CFR 124.110(e), and 13 CFR 124.111(d). The new language advises contracting officers that an 8(a) participant owned by an Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation, may not receive a sole source, follow-on 8(a) contract, if the predecessor contract was performed by another participant owned by the same Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation.

I. FAR 19.808-2 and 19.809 proposed revisions are minor technical clarifications.

J. FAR 19.810 proposes to revise the title from "SBA appeals", to "SBA appeals of a contracting officer's decision to the agency head", and makes minor technical clarifications.

K. FAR 19.811 and 19.812 proposed revisions are minor technical clarifications.

L. Proposed new FAR section, FAR 19.813, Protesting an 8(a) Participant's eligibility or size status, adds language to clarify that the eligibility of an 8(a) participant for a sole source or competitive 8(a) requirement may not be challenged. However, a successful offeror's size status for a competitive 8(a) award may be protested by any offeror whom the contracting officer has not eliminated for reasons unrelated to size, the contracting officer or SBA.

M. Proposed new FAR section, FAR 19.814, Requesting a formal size determination (8(a) sole source requirements), is added to clarify that if the size of an 8(a) participant nominated for award of an 8(a) sole source contract is called into question, a formal size determination may be requested.

N. Proposed new FAR section, FAR 19.815, Release for non-8(a) procurement is added to provide the procedures for obtaining SBA's consent to release an 8(a) requirement for non-8(a) procurement, and a brief discussion of the matters that will be taken into consideration in order to reach a decision as to whether or not releasing a requirement for non-8(a) procurement is in the best interest of the agency, and the business development program.

O. Proposed new FAR section, FAR 19.816, Exiting the 8(a) Program, adds language to advise contracting officers that—

1. When a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts. However, the contractor remains under contractual obligation to complete existing contracts, and any priced options that may be exercised.

2. If an 8(a) contractor is suspended from the program it may not receive any new 8(a) contracts unless the head of the contracting agency (or designee) makes a determination that it is in the best interest of the Government to issue the award and SBA adopts that determination.

3. A contractor that has completed its term of participation in the 8(a) program may be awarded a

competitive 8(a) contract if it was an 8(a) participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if the contractor continues to meet all other applicable eligibility criteria.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) do not expect this proposed rule to have a significant economic impact on a substantial

number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because these changes do not place any new requirements on small business. The purpose of this rule is to implement changes made in SBA's final rule, published in the Federal Register at 76 FR 8222 on February 11, 2011 pertaining to the 8(a) Business Development Program and to clarify existing guidance in the FAR.

The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The issues addressed in this proposed rule include: (1) clarification of the evaluation, offering, and acceptance process; (2) procedures for acquiring SBA's consent to release an 8(a) requirement outside the 8(a) program; and (3) clarification that it is the contracting officer's responsibility to determine that the potential 8(a) contractor meets the applicable performance of work requirements at time of award, and the impact of exiting the 8(a) program in terms of the firm's ability to receive future 8(a) requirements and its current contractual commitments. These revisions do not place any new requirements, financial or otherwise, on small entities, and serve mainly to provide more explicit guidance to Federal contracting officials. Currently, the 8(a) Program has approximately 8,567 participants. These participants may or may not be economically impacted by the changes discussed in this proposed rule.

This proposed rule will not impose any new information collections requirements on small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no alternative approaches that will accomplish the stated objectives of the rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2012-022) in correspondence.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 5, 6, 18, 19, and 52

Government procurement.

Dated: January 23, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 5, 6, 18, 19 and 52 as set forth below:

1. The authority citation for 48 CFR part 5 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Amend section 5.205 by revising paragraph (f) to read as follows:

5.205 Special situations.

* * * * *

(f) Section 8(a) competitive acquisition. When a national buy requirement is being considered for competitive acquisition limited to eligible 8(a) participants under subpart 19.8, the contracting officer must transmit a synopsis of the proposed contract action to the GPE. The synopsis may be transmitted to the GPE concurrent with submission of the agency offering (see 19.804-2) to the Small Business Administration (SBA). The synopsis should also include information—

(1) Advising that the acquisition is being offered for competition limited to eligible 8(a) participants;

(2) Specifying the North American Industry Classification System (NAICS) code;

(3) Advising that eligibility to participate may be restricted to 8(a) participants in either the developmental stage or the developmental and transitional stages; and

(4) Encouraging interested 8(a) participants to request a copy of the solicitation as expeditiously as possible since the solicitation will be issued without further notice upon SBA acceptance of the requirement for the section 8(a) program.

PART 6—COMPETITION REQUIREMENTS

3. The authority citation for 48 CFR part 6 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

4. Revise section 6.204 to read as follows:

6.204 Section 8(a) competition.

(a) To fulfill statutory requirements relating to section 8(a) of the Small Business Act, as amended by Pub. L. 100-656, contracting officers may limit competition to eligible 8(a) participants (see Subpart 19.8).

(b) No separate justification or determination and findings is required under this part to limit competition to eligible 8(a) participants. (But see 6.302-5 and 6.303-1 for sole-source 8(a) awards over \$20 million.)

PART 18—EMERGENCY ACQUISITIONS

5. The authority citation for 48 CFR part 18 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

18.114 [Amended]

6. Amend section 18.114 by removing "firms" and adding "participants" in its place.

PART 19—SMALL BUSINESS PROGRAMS

7. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

19.000 [Amended]

8. Amend section 19.000 by removing from paragraph (a)(3) "business development".

9. Revise the subpart heading of 19.8 to read as follows:

Subpart 19.8—Contracting with the Small Business Administration (The 8(a) program)

* * * * *

10. Revise section 19.800 to read as follows:

19.800 General.

(a) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation. This program is the "8(a) Business Development Program", commonly referred to as the "8(a) program". A small business that is accepted into the 8(a) program is known as a "participant". SBA's subcontractors are referred to as "8(a) contractors". As used in this subpart, an 8(a) contractor is an 8(a) participant that is currently performing on a Federal contract or order that was reserved for 8(a) participants.

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) participants on either a sole source or competitive basis.

(c) Acting under the authority of the program, the SBA certifies to an agency that the SBA is competent and responsible to perform a specific contract. The contracting officer has the discretion, to award the contract to the SBA based upon mutually agreeable terms and conditions.

(d) The contracting officer shall comply with 19.203 before deciding to offer an acquisition to a small business

concern under the 8(a) program. For acquisitions above the simplified acquisition threshold, the contracting officer shall consider 8(a) set-asides or sole source awards before considering small business set-asides.

(e) When SBA has delegated its 8(a) program contract execution authority to an agency, the contracting officer must refer to its agency supplement or other policy directives for appropriate guidance.

11. Revise section 19.802 to read as follows:

19.802 Determining eligibility for the 8(a) program.

Determining the eligibility of a small a business to be a participant in the 8(a) program is the responsibility of the SBA. SBA's regulations on eligibility requirements for participation in the 8(a) program are found at 13 CFR 124.101 through 124.112.

12. Revise section 19.803 to read as follows:

19.803 Selecting acquisitions for the 8(a) program.

Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) participants to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways—

(a) The SBA advises the contracting activity of an 8(a) participant's capabilities through a search letter and

requests the contracting activity to identify acquisitions to support the participant's business plans. In these instances, the SBA will provide at minimum the following information in order to enable the contracting activity to match an acquisition to the participant's capabilities:

(1) Identification of the concern and its owners.

(2) Background information on the concern, including any and all information pertaining to the concern's technical ability and capacity to perform.

(3) The participant's present production capacity and related facilities.

(4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the concern's plans to present and future agency requirements.

(5) If construction is involved, the request shall also include the following:

(i) A participant's capabilities in and qualifications for accomplishing various categories of construction work typically found in North American Industrial Category System subsector 236 (construction of buildings), subsector 237 (heavy and civil engineering construction), or subsector 238 (specialty trade contractors).

(ii) The participant's capacity in each construction category in terms of estimated dollar value (e.g., electrical, up to \$100,000).

(b) The SBA identifies a specific requirement for one or more 8(a) participant(s) and sends a requirements letter to the agency's small business office, requesting the contracting office offer the acquisition to the 8(a) program. In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; e.g., project name or number;

(2) A statement as to how the required equipment and real property will be provided in order to ensure that the participant will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the participant(s); and

(4) Either—

(i) If a sole source request—

(A) The reasons why the participant is considered suitable for this particular acquisition; e.g., previous contracts for the same or similar supply or service; and

(B) A statement that the participant is eligible in terms of its small business size status relative to the assigned NAICS code, business support levels, and business activity targets; or

(ii) If competitive, a statement that at least two 8(a) participants are considered capable of satisfying the agency's requirements and a statement that the participants are also eligible in terms of their small business size status relative to the assigned NAICS code, business support levels, and business activity targets. If requested by the contracting office, SBA will identify at least two such participants and provide information concerning the participants' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) participant, identify a requirement for the 8(a) program, they may offer on behalf of a specific 8(a) participant, for the 8(a) program in general, or for 8(a) competition.

13. Revise section 19.804-1 to read as follows:

19.804-1 Agency evaluation.

In determining the extent to which a requirement should be offered in support of the 8(a) program, the agency should evaluate—

(a) Current and future plans to acquire the specific items or work that 8(a) participants are seeking to provide, identified in terms of—

(1) Estimated quantities of the supplies or services required or the estimated number of construction projects planned; and

(2) Performance or delivery requirements, including—

(i) Required monthly production rates, when applicable; and

(ii) For construction, geographical location;

(b) The impact of any delay in delivery;

(c) Whether the items or work have previously been acquired using small business set-asides, and the date the items or work were acquired;

(d) Problems encountered in previous acquisitions of the items or work from the 8(a) participants or other contractors; and

(e) Any other pertinent information about known 8(a) participants, the items, or the work. This includes any information concerning the participants' products or capabilities. When necessary, the contracting agency shall

make an independent review of the factors in 19.803(a) and other aspects of the participants' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) program.

14. Amend section 19.804-2 by—

- a. Revising the introductory text of paragraph (a) and paragraph (a)(10);
- b. Redesignating paragraphs (a)(12) through (a)(15) as paragraphs (a)(13) through (a)(16), respectively;
- c. Adding a new paragraph (a)(12);
- d. Removing from the newly designated paragraph (a)(13) "Program" and adding "program" in its place;
- e. Removing from the newly designated paragraph (a)(15) "sole source" and adding "sole-source" in its place; and
- f. Removing from paragraph (b)(3) "firm" and adding "8(a) participant" in its place (twice).

The revised and added text reads as follows:

19.804-2 Agency offering.

(a) After completing its evaluation, the contracting office shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work. The notification, referred to as an offering letter, shall identify the time frames within

which prime contract and subcontract actions must be completed in order for the agency to meet its responsibilities. The offering letter shall also contain the following information applicable to each prospective contract:

* * * * *

(10) Identification of any particular 8(a) participant designated for consideration, including a brief justification, such as—

(i) The 8(a) participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated 8(a) participant concern is the incumbent.

* * * * *

(12) Identification of all 8(a) participants which have expressed an interest in being considered for the acquisition.

* * * * *

15. Revise section 19.804-3 to read as follows:

19.804-3 SBA acceptance.

(a) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the

requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within 2 working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(1) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within 10 working days, the contracting office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate Administrator for Business Development within five calendar days of receipt of the contracting office's request.

(2) For acquisitions not exceeding the simplified acquisition threshold, when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within 2 working days, the contracting office may

assume the offer is accepted and proceed with award of an 8(a) contract.

(b) As part of the acceptance process, SBA will review the appropriateness of the NAICS code designation assigned to the requirement by the contracting officer.

(1) SBA will not challenge the NAICS code assigned to the requirement by the contracting officer if it is reasonable, even though other NAICS codes may also be reasonable.

(2) If SBA and the contracting officer are unable to agree on a NAICS code designation for the requirement, SBA may refuse to accept the requirement for the 8(a) program, appeal the contracting officer's determination to the head of the agency pursuant to 19.810, or appeal the NAICS code designation to the SBA Office of Hearings and Appeals under Subpart C of 13 CFR Part 134.

(c) Sole-source 8(a) awards. If an appropriate match exists, SBA will advise the contracting officer whether it will participate in contract negotiations or whether SBA will authorize the contracting officer to negotiate directly with the identified 8(a) participant. Where SBA has delegated its contract execution functions to a contracting agency, SBA will also identify that delegation in its acceptance letter.

(1) Sole-source award where the contracting officer nominates a specific 8(a) participant. SBA will determine whether an appropriate match exists where the contracting officer identifies a particular participant for a sole-source award.

(i) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole-source contract, SBA will normally accept it on behalf of the 8(a) participant recommended by the contracting officer, provided that 8(a) participant complies with the requirements of 13 CFR 124.503(c)(1).

(ii) If an appropriate match does not exist, SBA will notify the 8(a) participant and the contracting officer, and may then nominate an alternate 8(a) participant.

(2) Sole-source award where the contracting officer does not nominate a specific 8(a) participant. When a contracting officer does not nominate as 8(a) participant for performance of a sole-source 8(a) contract, SBA will select an 8(a) participant for possible award from among two or more eligible and qualified 8(a) participants. The selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial

condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts. (For construction requirements see 13 CFR 124.503(d)(1)).

16. Amend section 19.804-4 by—

- a. Removing from the introductory text "Program" and adding "program" in its place;
- b. Revising paragraph (b); and
- c. Removing from paragraph (d) "Program" and adding "program" in its place.

The revised text reads as follows:

19.804-4 Repetitive acquisitions.

* * * * *

(b) A nominated 8(a) participant's eligibility, and whether or not it is the same 8(a) participant that performed the previous contract;

* * * * *

17. Amend section 19.804-5 by revising paragraphs (a) and (c) to read as follows:

19.804-5 Basic ordering agreements.

(a) The contracting office shall submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) in addition to offering and accepting the BOA itself.

* * * * *

(c) Once an 8(a) contractor's program term expires, the contractor otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA, SBA will not accept new orders for the contractor.

18. Revise section 19.804-6 to read as follows:

19.804-6 Indefinite delivery contracts.

(a) Separate offers and acceptances are not required for individual orders under multiple award contracts (including the Federal Supply Schedules managed by GSA, multi-agency contracts or Government-wide acquisition contracts, or indefinite-delivery, indefinite-quantity (IDIQ) contracts) that have been set aside for exclusive competition among 8(a) contractors. SBA's acceptance of the original contract is valid for the term of the contract.

(b) An 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program, or becomes other than small for the NAICS code assigned to the contract.

(c) Agencies may continue to take credit toward their prime contracting small disadvantaged business or small business goals for orders awarded to 8(a) participants, even after the contractor's 8(a) program term expires, the

contractor otherwise exits the 8(a) program, or the contractor becomes other than small for the NAICS code assigned under the 8(a) contract. However, if an 8(a) contractor rerepresents that it is other than small for the NAICS code assigned under the contract in accordance with 19.301-2 or, where ownership or control of the 8(a) contractor has changed and SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR 124.515), the agency may not credit any subsequent orders awarded to the contractor towards its small disadvantaged business or small business goals.

19. Amend section 19.805-1 by—

- a. Revising the introductory text of paragraph (a);
- b. Removing from paragraph (a)(1) "firms" and adding "participants" in its place; and
- c. Revising the introductory text of paragraph (b);
- d. Removing from paragraph (b)(1) "firms" and adding "participants" in its place
- e. Revising paragraph (d).

The revisions read as follows:

19.805-1 General.

(a) Except as provided in paragraph (b) of this subsection, an acquisition offered to the SBA under the

8(a) program shall be awarded on the basis of competition limited to eligible 8(a) participants when—

* * * * *

(b) Where an acquisition exceeds the competitive threshold as defined in paragraph (a)(2) of this section, the SBA may accept the requirement for a sole-source 8(a) award if—

* * * * *

(d) The SBA Associate Administrator for Business Development may approve a contracting office's request for a competitive 8(a) award below the competitive thresholds. Such requests will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) participants are available for competition. In determining whether a request to compete below the threshold will be approved, the SBA Associate Administrator for Business Development will, in part, consider the extent to which the contracting activity is supporting the 8(a) program on a noncompetitive basis. The agency may include recommendations for competition below the threshold in the offering letter or by separate correspondence to the SBA Associate Administrator for Business Development.

20. Revise section 19.805-2 to read as follows:

19.805-2 Procedures.

(a) Offers shall be solicited from those sources identified in accordance with 19.804-3.

(b) The SBA will determine the eligibility of the participants for award of the contract. Eligibility will be determined by the SBA as of the time of submission of initial offers which include price. Eligibility is based on Section 8(a) program criteria. An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(1) In either negotiated or sealed bid competitive 8(a) acquisitions SBA will determine the eligibility of the apparent successful offeror and advise the contracting office within 5 working days after receipt of the contracting office's request for an eligibility determination.

(i) If SBA determines that the apparent successful offeror is ineligible, the contracting office will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award. SBA determines whether a participant is eligible for a specific 8(a) competitive requirement as of

the date that the 8(a) participant submitted its initial offer which includes price.

(ii) If the contracting office believes that the apparent successful offeror (or the offeror SBA has determined eligible for award) is not responsible to perform the contract, the contracting office must refer the matter to SBA for Certificate of Competency consideration under 19.6.

(2) In any case in which a 8(a) participant is determined to be ineligible, SBA will notify the 8(a) participant of that determination.

(c) Any party with information concerning questioning the eligibility of an 8(a) participant to continue participation in the 8(a) program or for the purposes of a specific 8(a) award may submit such information to the SBA in accordance with 13 CFR 124.112(c).

21. Amend section 19.808-1 by removing from paragraph (c) "activity" and adding "officer" in its place; and adding paragraphs (d) and (e) to read as follows.

19.808-1 Sole source.

* * * * *

(d) An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(e) An 8(a) participant owned by an ANC, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation may not receive an 8(a) sole-source award that is a follow-on contract to an 8(a) contract, if the predecessor contract was performed by another 8(a) participant (or former 8(a) participant) owned by the same ANC, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation (See 13 CFR 124.109-124.111).

22. Revise section 19.808-2 to read as follows.

19.808-2 Competitive.

In competitive 8(a) acquisitions subject to Part 15, the contracting officer conducts negotiations directly with the competing 8(a) participants. Conducting competitive negotiations among 8(a) participants prior to SBA's formal acceptance of the acquisition for the 8(a) program may be grounds for SBA's not accepting the acquisition for the 8(a) program.

23. Revise section 19.809 to read as follows.

19.809 Preaward considerations.

The contracting officer should request a preaward survey of the 8(a) participant whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial

doubt as to the participant's ability to perform, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under Subpart 19.6.

24. Amend section 19.810 by—

- a. Revising the section heading;
- b. Removing from paragraph (a)(2) "firm" and "Program" and adding "participant" and "program" in its place, respectively;
- c. Removing from paragraph (a)(3) "activity's" and adding "officer's" in its place;
- d. Revising paragraph (b); and
- e. Removing from paragraph (c) "firm" and adding "participant" in its place.

The revisions read as follows:

19.810 SBA appeals of a contracting officer's decision to the agency head.

* * * * *

(b) Notification of an intent to appeal to the agency head by SBA must be received by the contracting officer within 5 working days after SBA is formally notified of the contracting officer's decision. SBA's Administrator will provide a copy of this notification of the intent to appeal to the contracting agency Director for Small and Disadvantaged Business Utilization or, for the Department

of Defense, the Director of Small Business Programs, SBA must send the written appeal to the agency head within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn. Pending issuance of a decision by the agency head, the contracting officer shall suspend action on the acquisition. The contracting officer need not suspend action on the acquisition if the contracting officer makes a written determination that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

* * * * *

25. Amend section 19.811-1 by revising the introductory text of paragraph (b) to read as follows:

19.811-1 Sole source.

* * * * *

(b) The contracting officer shall prepare the contract that the SBA will award to the 8(a) contractor in accordance with agency procedures, as if awarding the contract directly to the 8(a) contractor, except for the following:

* * * * *

19.811-3 [Amended]

26. Amend section 19.811-3 by—

a. Removing from the introductory text of paragraph (d) "Concerns" and adding "Participants" in its place; and

b. Removing from paragraphs (d)(1) and (e) "concerns" and adding "participants" in its place, respectively.

27. Amend section 19.812 by removing from paragraph (b) "firm" and adding "8(a) contractor" in its place; and revising paragraph (d) to read as follows:

19.812 Contract administration.

* * * * *

(d) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) contractor to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) contractor's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 calendar days after such an occurrence. The clauses in the contract entitled "Special 8(a) Contract

Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer shall take action immediately to preserve the option of waiving the termination requirement. The contracting officer shall determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's program objectives or mission, the contracting officer shall immediately notify the SBA in writing that the agency is requesting a waiver. Within 15 business days thereafter, or such longer period as agreed to by the agency and the SBA, the agency head must either confirm or withdraw the request for waiver. Unless a waiver is approved by the SBA, the contracting officer must terminate the contract for convenience upon receipt of a written request by the SBA. This requirement for a convenience termination does not affect the Government's right to terminate for default if the cause

for termination of an 8(a) contract is other than the transfer of ownership or control.

28. Add sections 19.813 through 19.816 to read as follows:

19.813 Protesting an 8(a) Participant's eligibility or size status.

(a) The eligibility of an 8(a) participant for a sole-source or competitive 8(a) requirement may not be challenged by another 8(a) participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest (see 13 CFR 124.517).

(b) The size status of an 8(a) participant nominated for an 8(a) sole-source contract may not be protested by another 8(a) participant or any other party.

(c) The size status of the apparent successful offeror for competitive 8(a) awards may be protested. The filing of a size status protest is limited to—

(1) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(2) The contracting officer; or

(3) The SBA District Director, or designee, in either the district office serving the geographical area in which the contracting activity is located or the district

office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(d) Protests of competitive 8(a) awards shall follow the procedures at 19.302. For additional information, refer to 13 CFR 121.1001.

19.814 Requesting a formal size determination (8(a) sole source requirements).

(a) If the size status of an 8(a) participant nominated for award of an 8(a) sole-source contract is called into question, a request for a formal size determination may be submitted to SBA pursuant to 13 CFR 121.1001(b) (2) (ii) by—

(1) The 8(a) participant nominated for award of the particular sole-source contract;

(2) The contracting officer who has been delegated SBA's 8(a) contract execution functions, where applicable, or the SBA program official with authority to execute the 8(a) contract; or

(3) The SBA District Director in the district office that services the 8(a) participant or the Associate Administrator for Business Development.

(b) SBA's Government Contracting Area Director or designee will issue a formal size determination within 15

business days, if possible, after SBA receives the request for a formal size determination.

(c) An appeal from an SBA size determination shall follow the procedures at 19.302.

19.815 Release for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).

(b) To obtain release of a requirement for a non-8(a) procurement, the contracting officer shall make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.

(c)(1) The SBA Associate Administrator for Business Development will consider the following information when determining whether to release a requirement from the 8(a) program—

- (i) Whether the agency has achieved its SDB goal;
- (ii) Whether the agency has not achieved its HUBZone, SDVOSB, WOSB, or small business goal(s);
- (iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) Generally, a requirement that was previously accepted into the 8(a) program will only be released for procurements outside the 8(a) program when the contracting activity agency agrees to set-aside the requirement under the small business, HUBZone, SDVOSB, or WOSB programs.

(3) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

19.816 Exiting the 8(a) program.

(a) When a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts. However, the contractor remains under contractual obligation to complete existing contracts, and any priced options that may be exercised.

(b) If an 8(a) contractor is suspended from the program (see 13 CFR 124.305), it may not receive any new 8(a) contracts unless the head of the contracting agency (or designee) makes a determination that it is in the best interest of the Government to issue the award and SBA adopts that determination.

(c) A contractor that has completed its term of participation in the 8(a) program may be awarded a competitive 8(a) contract if it was an 8(a) participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if the contractor continues to meet all other applicable eligibility criteria.

(d) SBA's regulations on exiting the 8(a) program are found at 13 CFR 124.301 through 124.305, and 13 CFR 124.507(d).

29. Amend section 19.1504 by revising paragraph (a) to read as follows:

19.1504 Exclusions.

* * * * *

(a) Requirements that an 8(a) contractor is currently performing under the 8(a) program or that SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

30. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(17) to read as follows:

**52.212-5 Contract Terms and Conditions Required to
Implement Statutes or Executive Orders—Commercial Items.**

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS (DATE)

* * * * *

(b) * * *

(17) 52.219-14, Limitations on Subcontracting
(Date) (15 U.S.C. 637(a) (14)).

* * * * *

31. Amend section 52.219-11 by revising the date of
the clause and paragraph (c) to read as follows:

52.219-11 Special 8(a) Contract Conditions.

* * * * *

SPECIAL 8(A) CONTRACT CONDITIONS (DATE)

* * * * *

(c) Except for novation agreements, delegate to the
_____ [insert name of contracting agency] the
responsibility for administering the subcontract to be
awarded hereunder with complete authority to take any
action on behalf of the Government under the terms and
conditions of the subcontract; provided, however, that the
_____ [insert name of contracting agency] shall give
advance notice to the SBA before it issues a final notice
terminating the right of a subcontractor to proceed with
further performance, either in whole or in part, under the
subcontract for default or for the convenience of the
Government.

* * * * *

32. Amend section 52.219-12 by revising the date of the clause and removing from paragraph (b) (2) "and advance payments".

The revision reads as follows:

52.219-12 Special 8(a) Subcontract Conditions.

* * * * *

SPECIAL 8 (A) SUBCONTRACT CONDITIONS (DATE)

* * * * *

33. Amend section 52.219-14 by revising the date of the clause and removing from paragraphs (b) (1), (b) (2), and (b) (3) "8(a) concerns" and adding "8(a) participants" in its place.

The revision reads as follows:

52.219-14 Limitations on Subcontracting.

* * * * *

LIMITATIONS ON SUBCONTRACTING (DATE)

* * * * *

34. Amend section 52.219-17 by revising the date of the clause; and removing from paragraph (a) (2) "and advance payments".

The revision reads as follows:

52.219-17 Section 8(a) Award.

* * * * *

SECTION 8 (A) AWARD (DATE)

* * * * *

35. Amend section 52.219-18 by:

- a. Revising the section and clause heading;
- b. Revising the date of the clause; and
- c. Removing from Alternate I "concerns" and adding "participants" in its place.

The revisions read as follows.

**52.219-18 Notification of Competition Limited to Eligible
8(a) Participants.**

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8 (A) PARTICIPANTS (DATE)

* * * * *

[BILLING CODE 6820-EP]

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